Supreme Court, U.S.
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No.

IN THE

SUPREME COURT OF THE UNITED STATES

ROBERT W. AYLWARD,

Petitioner,

versus

CLAIRE W. BAMBERG,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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PETITION FOR A WRIT OF CERTIORARI

ALPHONSO MANNS, Esquire
Counsel of Record
405 W. 6th Street
Bloomington, Indiana 47402
(812) 336-8076

WESTERFIELD-BONTE CO., 619 W. KENTUCKY–P.O. BOX 3251, LOUISVILLE, KY.

3600

QUESTION PRESENTED FOR REVIEW

WHETHER THE CLOSURE ORDER OF THE U.S. DISTRICT COURT TO SEAL BAMBERG'S DOCUMENTS ATTACHED TO HER AFFIDAVIT FROM AYLWARD'S PERSONAL ACCESS AND TO ENJOIN HIS LAWYER FROM DISCUSSING THE DOCUMENTS WITH HIS CLIENT DENIED AYLWARD THE RIGHT AND FAIR OPPORTUNITY TO PREPARE AND REBUT BAMBERG'S MOTION FOR PARTIAL SUMMARY JUDGMENT PURSUANT TO THE DUE PROCESS REQUIREMENTS OF FEDERAL RULE OF CIVIL PROCEDURE 56?

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OPINIONS BELOW

The decision of Robert W. Aylward v. Claire W. Bamberg, United States Court of Appeals for the Seventh Circuit, Chicago, Illinois, No. 98-2119, is set forth in the Appendix, at 1a. The Order on Defendant's Motion for Partial Summary Judgment in *Robert W. Aylward* v. *Claire W. Bamberg,* United States District Court for the Southern District of Indiana, Indianapolis Division, No. 94-C-705 dated November 18, 1997 is set forth in the Appendix, at 14a.

STATEMENT OF THE BASIS OF JURISDICTION OF THE SUPREME COURT

The statutory provision for this Court's jurisdiction is 28 U.S.C. Section 1254 and 28 U.S.C. 2101(c). The United States Court of Appeals for the Seventh Circuit issued its order on July 6, 1999. There is no order respecting rehearing or granting an extension of time to file the petition for a writ of certiorari. This petition was timely filed within 90 days of the order of the circuit court.

RELEVANT FEDERAL RULES INVOLVED IN THIS CASE

Fed. R. Civ. P. 56 (a):

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Fed.R. Civ. P. 56 (b):

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.

STATEMENT OF THE CASE

Appellant Robert W. Aylward ("Aylward") raised a defamation claim against Appellee Claire W. Bamberg ("Bamberg") in the U.S. District Court, Southern Indiana based on diversity jurisdiction. Essentially, Aylward, a military officer residing in the State of Georgia, alleged that Bamberg, a resident of the State of Indiana and counselor to Aylward's former wife, in conspiracy with her and

others, committed slander against him under Indiana law when she reported to the military police at Fort Benning, Georgia that he sexually abused his children. Bamberg responded that Indiana law required her to make the report and shielded her with immunity.

Bamberg filed a motion for partial summary judgment on Aylward's defamation claim. In support of the motion, Bamberg submitted a set of numerous documents attached to her affidavit consisting of ninety-nine pages concerning Aylward's children to show that she had reasonable belief of the alleged sexual abuse. Bamberg also filed a motion to seal the documents, not only from public access, but also from Aylward's personal access or review. Bamberg contended that because of her relationship with Aylward's former wife, the privilege of communication between psychotherapist and patient required sealing the documents.

Aylward objected to the admissibility of the documents for several reasons, including, hearsay grounds and Bamberg's lack of personal knowledge of the information contained in the documents. Subject to whatever evidentiary value the documents may have, Aylward did not object to the district court's closure order to seal the documents from public access, but did object to the court sealing them from his personal access or review and the restriction imposed upon his lawyer from discussing the information contained in the documents with him. Aylward contended that because Bamberg was not licensed or certified by any state, no psychotherapist-patient privilege stood as legal and sufficient grounds for the closure order.

Without explanation or entering findings of fact for doing so, the district court granted the motion to seal the documents. The order permitted Aylward's lawyer to have access to the documents, but Aylward was prohibited from viewing them and Aylward's lawyer was enjoined from discussing them with anyone, including Aylward. The dis-

trict court issued an order of partial summary judgment in favor of Bamberg. Aylward took an interlocutory appeal pursuant to Fed.R.Civ.P. 54 (b). The Court of Appeals of the Seventh Circuit agreed that Bamberg failed to show that there was a privilege that justified sealing the documents, but affirmed the district court's order on the basis that sealing the documents protects the interest of Aylward's children.

ARGUMENT

The Closure Order of the Court Denied Aylward the Right and Fair Opportunity to Prepare and Rebut Bamberg's Motion for Summary Judgment Pursuant to the Due Process Requirements of Rule 56.

The closure order denied Aylward the right and the fair opportunity to prepare and rebut the motion for summary judgment. The Supreme Court has stated that when a court finds that the presumption of access has been rebutted by some countervailing interest, that "interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered." *Press Enterprise Co.* v. *Superior Court*, 464 U.S. 501, 510, 104 S.Ct. 819, 824, 78 L.Ed.2d 629 (1985). The reason for this holding is because public access is essential to the proper functioning of the court. There is a public interest in assuring that courts are fairly run and judges are honest. *Matter of Continental Illinois Securities Litigation*, 732 F.2d 1302, 1314 (C.A.7, Ill. 1984) The district court did not explain or enter findings of fact in regard to the closure order. However, the court of appeals determined that sealing the documents protects the interest of Aylward's children. Because the issue before this court is not whether the public should have access to the documents, no countervailing interest of the Aylward's

children raises a First Amendment issue of public disclosure as discussed in *Press Enterprise Co.* Nevertheless, the principle of judicial fairness to adversarial litigants require that they have full access to the same information used as evidence.

Sealing is an exceptional measure. See *Grove Fresh Distributors, Inc.* v. *Everfresh Juice Co.*, 24 F.3d 893, 897 (7th Cir.1994) (seal only appropriate where necessary to preserve higher values). The district court should only seal documents which are necessary and legally required to keep confidential. See *Matter of Krynicki*, 983 F.2d 74 (7th Cir. 1992) Sealing the documents was not necessary because Aylward's children were not directly involved in this case and had no interest in the outcome. Furthermore, there was no legal requirement that the documents had to be concealed. Thus, Bamberg failed to show that this closure measure was so compelling as to constitute an extraordinary exception to deny Aylward's full personal participation in this case.

In contrast, Aylward has a significant evidentiary burden to overcome the motion for summary judgment which may preclude the opportunity to litigate his case before a jury. Rule 56(c) provides:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Rule 56(e) provides:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in

> this rule, must set forth specific facts showing that there is a genuine issue for trial.

The focus of the evidentiary burden on both litigants is on the matter of "genuine issue of material fact." See *Anderson* v. *Liberty Lobby, Inc.*, 455 U.S. 242 (1986). As to materiality, the substantive law will identify which facts are material. Id. Summary judgment will not lie if the dispute about a material fact is genuine, that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *Id.* Consequently, probative evidence on a motion for summary judgment must be the same kind of evidence upon which the parties may conduct direct and cross examination in open court.

On a motion for summary judgment the nonmovant's lawyer must look to his client for facts or where he might find the facts to meet his client's evidentiary burden to show that there is a genuine issue of material fact. The district court's order to seal Bamberg's documents from Aylward's personal access or review is analogous to strapping his lawyer with one of his arms behind his back to prevent him from acquiring the assistance of his client to conduct a cross examination of the documents and in seeking specific rebuttal facts to those submitted by Bamberg to support her motion. As the court of appeals indicated, Bamberg's concern for protecting herself is misplaced since she put the documents in issue as evidence. Due process and fair play requires that Aylward is able to see the evidence Bamberg sees and uses against him, and vice versa. Our tradition as a matter of public policy, our sense of fair play, and American criminal jurisprudence under the Sixth Amendment to the U.S. Constitution support the notion that there is a right for a person to be represented, but also the person has a right to defend himself.

The closure order is fundamentally and inherited unfair since Aylward's lawyer could not discuss the docu-

ments with his client. Because Aylward's lawyer was enjoined from discussing the documents with his client, the order posed a significant threat to the free flow of communication between them. A lawyer must be able to discuss any and all evidence with his client to provide effective assistance of counsel. The circumstances of this case could not present itself to a litigant acting pro se. Consequently, the closure order inhibited the ability of Aylward's lawyer to prepare his client's case and he served as an obstructer rather than a facilitator to his client's interests. Furthermore, the order was not necessary to further any interest in protecting the children, such as from trauma, public embarrassment, threat, or reprisals. The order simply impinged upon the truth-seeking process of the court, which raises an important question of accessibility of litigants to the courts.

CONCLUSION

A nonmovant litigant must have personal access to the evidence used against him on a motion for summary judgment as a matter of due process to have a fair opportunity to prepare and rebut the movant's motion. A litigant must be able to discuss all the evidence made available to his lawyer to provide effective assistance of counsel. The closure order of the court exceeded what was reasonably necessary to protect Aylward's children, and denied Aylward due process under the procedures of summary judgment. The Court of Appeals has sanctioned a departure by the district court from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power.

The Court should grant certiorari to review this important question concerning the accessibility of a litigant to the court; reverse and set aside the order of the Seventh Circuit and the district court's closure order and order of partial summary judgment; and remand the case for further proceedings consistent with the opinion of this Court.

Respectfully submitted,

ALPHONSO MANNS
405 W. 6th St.
P.O. Box 1914
Bloomington, IN 47402
(812) 336-8076